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Chairman: Mr. Suheimat (Vice-Chairman) ..... (Jordan)
later: Mr. Politi (Chairman) ..... (Italy)

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In the absence of the Chairman, Mr. Suheimat (Jordan), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Kerma** (Algeria) said that he welcomed the progress made by the International Law Commission on the issue of State responsibility, which was very important for harmonious international relations and constituted one of the fundamental areas of contemporary international law. The codification of State responsibility was a crucial alternative to the use of force as a means of settling disputes between States, and represented the best way of guaranteeing the maintenance of international peace and security. His delegation felt, moreover, that the strengthening of the system of State responsibility served to consolidate peace.

2. The issue of countermeasures, which was at the heart of the draft articles under consideration, was a delicate and controversial subject. In that connection, his delegation had already expressed some reluctance to accept their inclusion in the draft articles because it feared the introduction, into relations between States, of a regime equivalent to sanctions regimes that would enable some States, usually the most powerful ones, to restore a situation by themselves on the ground that had been breached by a wrongful act. That idea, which had originated from the practice of certain States, especially the most powerful ones, could not aspire to universality and, consequently, to codification as a rule of international law unless it was subject to the most extreme precautions.

3. Thus, an exercise that would lead to the codification of a legal regime of countermeasures that did not take into account the de facto inequality between States, even if such an exercise took place with a view to the progressive development of international law, would only give legal sanction to what was, to say the least, a debatable practice. It might indeed be wondered whether such a codification exercise would tend to legitimize the use of countermeasures as tools for individual coercive actions by certain Powers. In fact, while Algeria had never disputed the existence, according to international custom, of a rule of international law authorizing a State to breach a legal obligation towards a State that had committed a wrongful act against it, Algeria was concerned about the conditions for the application of such countermeasures.

4. In that connection, the Algerian delegation welcomed the content of new draft article 51, entitled "Obligations not subject to countermeasures", which enumerated a number of obligations from which countermeasures could not involve any derogation, particularly the obligation to refrain from the use of force, obligations for the protection of fundamental human rights and humanitarian obligations prohibiting any form of reprisals, as well as obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents. Thus, all countermeasures that breached those obligations were prohibited under that draft article. However, the Algerian delegation felt that the draft article should also expressly prohibit all countermeasures that could undermine the sovereignty, independence or territorial integrity of States. Moreover, it was pleased to note that the taking of countermeasures was subject to conditions and instructions laid down in some provisions of the draft articles concerning, respectively, resort to countermeasures (draft articles 53 and 55), the principle of proportionality and dispute settlement procedures.

5. When a State committed a wrongful act, the injured State was entitled to demand the cessation of the act and to require appropriate reparation. That was where the principle of proportionality came into play; that principle, which was clearly affirmed in draft article 52, should apply only to the level of measures necessary to ensure that the State having committed the wrongful act honoured its obligations. Countermeasures could only be proportional to the harm suffered and should not go beyond that level. With respect to collective countermeasures, the Algerian delegation would have difficulty accepting the idea that the right to react could be delegated to a group of countries acting outside any institutional framework, as the Commission's report seemed to envisage; that subject deserved further discussion and analysis.

6. With respect to Part One, chapter V, of the draft articles, which concerned circumstances precluding wrongfulness, Algeria fully shared the views expressed by the Commission and endorsed the deletion of draft article 42, paragraph 4, concerning penal

consequences, since it could not conceive of such consequences in international law with regard to States. The series of draft articles on countermeasures seemed, on the whole, to be consistent with the approach based on the unequal ability of States to take such actions. In general, his delegation supported the provisions of those draft articles, which tended to restrict States' freedom of action in the area of countermeasures.

7. The draft articles provided that an injured State that took countermeasures must fulfil its dispute settlement obligations under Part Three of the draft or any other mandatory dispute settlement procedure in force between the States concerned. He was satisfied with the Commission's approach to the use of certain means of international dispute settlement in relation to the adoption of countermeasures. The aim was to give preference, in all cases, to the principle of the peaceful settlement of international disputes. However, apart from mandatory dispute settlement procedures contained in binding legal instruments opposable to the parties to the dispute, the consent of States remained the crucial factor for the use of any means of dispute settlement, and Algeria's position was close to that of the Commission in that regard. In any event, the question of whether or not to include the issue of dispute settlement in the draft articles would depend on the final form of the draft; the views expressed on that subject were still very divergent.

8. In conclusion, he stressed that countermeasures should play a positive and constructive role to the extent that their aims should include only the cessation of the wrongful act, the restoration of respect for international law and reparation of the harm caused, and that they must not have consequences that could endanger international peace and security. The Commission had done important work on State responsibility, but must still complete the consideration of a number of pending issues, such as the definition of an injured State, before it could bring that ambitious undertaking to a successful conclusion.

9. **Mr. Hmoud** (Jordan) said that the text under consideration was a major improvement over the one adopted on first reading in 1996. It was better structured, simpler and more consistent. Moreover, it avoided controversial issues that were not necessarily within the scope of the draft articles on State responsibility. Instead, it focused on the consequences of internationally wrongful acts; that issue had proved to be problematic and confused in the first reading.

10. His delegation welcomed the deletion of former draft article 19, which had distinguished between the civil and criminal liability of States in international law and had contributed to the controversy on the notion of international crimes. Furthermore, by giving examples of international crimes, former draft article 19 had given rise to ideological conflict and had allowed political considerations to have a bearing on States' acceptance of that notion.

11. The introduction, in Part Two, of a new chapter III entitled "Serious breaches of essential obligations to the international community" reflected a clever approach that avoided the shortcomings of former draft article 19 while subjecting serious breaches of obligations *erga omnes* to a special regime of State responsibility. However, the concept of criminal liability of a State was not entirely absent from the draft articles adopted on second reading. The notion of punitive damages had been retained in paragraph 1 of new draft article 42, which referred to damages reflecting the "gravity" of the breach.

12. While his delegation agreed that the concept of State "crimes" should not be the subject of debate in the context of the adoption of the draft articles on State responsibility, it welcomed the fact that the concept of *actio popularis* was envisaged in the draft articles, including the obligations set forth in article 42, paragraph 2. The collective reaction of the international community of States to a serious breach of the obligations owed to it and essential for the protection of its fundamental interests was an important deterrent. Furthermore, it encouraged the cessation of the wrongful act and contributed to the realization of the forms of reparation sought. His delegation had noted that the collective reaction of States should not be understood as overlapping with the enforcement measures provided for in Chapter VII of the Charter of the United Nations, which were among the prerogatives of the Security Council in maintaining international peace and security. Draft article 59 provided adequate safeguards in that respect.

13. The definition of the injured State, as adopted on first reading of the draft articles, had created confusion between the rights of the injured State and those of States that were not necessarily injured by the commission of an internationally wrongful act but had a legitimate interest in the fulfilment of the obligation breached. That applied, in particular, to the breach of obligations *erga omnes* and to the "right" of interested

States to invoke the responsibility of the State committing the wrongful act, as suggested by the International Court of Justice in the *Barcelona Traction* case. The introduction of a new part, part two bis, on second reading of the draft articles, was an interesting effort by the Special Rapporteur to establish a distinction between the rights of injured States and those of non-injured but legally interested States. His delegation considered, however, that the new draft articles did not distinguish adequately between the concept of the State "injured" because the breach of the obligation was "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" and the concept of the "non-injured" State that had a collective interest in the obligation breached. In practice, problems would arise as to the capacity of a State to invoke responsibility, particularly in the case of a breach of multilateral obligations. The threshold that qualified a State to invoke responsibility as an injured State, because of a breach of an integral obligation or an obligation owed to the international community, must be better defined.

14. Since the *Barcelona Traction* case, there had been much debate on the issue of obligations owed to the international community as a whole in the fulfilment of which all States had a legal interest. While the draft articles on State responsibility had emphasized the concept of respect for obligations *erga omnes* and had provided for the concept's implementation, first, through the invocation of State responsibility and, second, through the regime of countermeasures, those obligations remained ill defined in international law. Although definition was not perhaps the goal of the draft articles on State responsibility, legal scholars must nevertheless endeavour to codify those obligations so as to avoid problems relating to both their definition and the capacity to invoke responsibility.

15. His delegation considered that the time had come to codify the legal regime of countermeasures. While the approach to that subject adopted by the Special Rapporteur on second reading of the draft articles was creative and progressive, it did not necessarily undermine the legal value of the regime. On the contrary, the exercise was necessary in order to safeguard the sovereignty of weaker States in the face of political countermeasures that were neither defined, nor impartial. Furthermore, the countermeasures regime should not be interpreted as an encroachment on the authority of the Security Council under Chapter VII of the Charter of the United Nations. Draft article 59 should provide the necessary guarantees in that respect to those who considered that there was an overlap between the two regimes of measures. Countermeasures could in fact be necessary to ensure that the State committing the internationally wrongful act ceased its action and made reparation for the damage caused.

16. Some considered that the draft articles on countermeasures were "punitive". In that respect, it should be pointed out that the regime of countermeasures, or reprisals not involving the use of force, already existed in international law for the purpose of obtaining reparation from the responsible State and securing the reversion to a situation of legality. Thus, as long as the goal of the countermeasures was to ensure respect for obligations, it was irrelevant how they were "described". Furthermore, the draft articles included all the necessary safeguards to ensure the legality of the measures taken and those safeguards went further than the case law on countermeasures. His delegation wished, however, to make certain comments regarding countermeasures, which it trusted would be taken into account by the Commission on second reading.

17. Excessive or disproportionate countermeasures "authorized" the responsible State to take retaliatory countermeasures. Such a situation might very well arise, and the consequences of such countermeasures, including escalation and the potential use of force, must be carefully considered. Draft article 54 introduced the new concept of collective countermeasures, which followed to a certain extent in the footsteps of the concept of collective self-defence. While it was acceptable to take collective countermeasures in the context of an initiative undertaken at the request of or on behalf of an "injured State", the issue of whether to authorize "any" State to take countermeasures against the author of a serious breach of the essential obligations owed to the international community needed to be studied further. It was hard to envisage how the principle of proportionality could be respected if "any" State was authorized to take countermeasures, as it deemed appropriate. Moreover, such countermeasures could well provoke an escalation, instead of restoring legality. Lastly, the obligation of the States taking

countermeasures to cooperate "as far as possible" was poorly defined, which would surely cast doubt on the legality of their actions while failing to contain countermeasures within their legal framework.

18. His delegation hoped that the Commission would complete its work on State responsibility and conclude the second reading by the end of its next session, in 2001. As to the form that the draft articles should take, it would favour a draft convention, provided that the comments just made were taken into consideration.

19. **Mr. Grasselli** (Slovenia) said that he would focus primarily on chapter IV of the Commission's report, which dealt with State responsibility. The Commission's decision to include in its report the text of the draft articles not yet officially adopted should facilitate the timely completion of work on the text.

20. With regard to the structure, part three of the 1996 draft had been completely deleted, on the assumption that the draft articles would not take the form of a convention. His delegation considered that, at the current stage of the work, the elaboration of a comprehensive dispute settlement system could be suspended, but it was still too early to decide what form the draft articles would take. However, if they were to take the form of an international convention, it would then be necessary to introduce a dispute settlement system.

21. Furthermore, with the inclusion of countermeasures in part two bis — countermeasures could not be taken if the dispute was submitted in good faith to a competent court or tribunal — regulation of dispute settlement was advisable. Article 23 was the only article from Part One to have been submitted to the Commission by the Drafting Committee and his delegation supported its inclusion, which was well founded.

22. His delegation agreed in principle with the concept of full reparation set out in article 31. The new paragraph 2 referred to damage, "whether material or moral", but tribunals were cautious in respect of non-material damage and a clause so general, lacking a concise definition, would not provide them with any clarification. Moreover, it was questionable whether the same concept of moral damage was applicable to all forms of reparation, namely, restitution, compensation and satisfaction. Article 31 did not take into account the mode of the breach. In law, if the responsible State was obliged to provide reparation, the responsibility, and thus the reparation, would differ depending on whether the wrongful act had been committed intentionally or through negligence, and the article should take that into account.

23. Slovenia took it that, in article 36, according to which a State responsible for an internationally wrongful act was under an obligation to make restitution, provided and to the extent that restitution was "not materially impossible", the expression "not materially impossible" covered those cases in which full reparation would deprive the responsible State of its means of subsistence. With regard to article 34, his delegation would like to see the inclusion of a general provision imposing an obligation *erga omnes* on the responsible State among the general principles contained in Chapter I of Part Two. There was no doubt that the obligations owed to the international community as a whole were those that arose from a violation of the peremptory norms of international law. The fact that the specific content of those norms was not defined did not prevent their inclusion as a general principle. In practice, a general principle would not be sufficient. That was why the draft articles should cover the most fundamental obligations, those that were owed to the international community as a whole and the most serious breaches of those obligations. Slovenia was not unaware of the problems raised by the notion of international crime as a category of internationally wrongful acts and did not wish to restart the debate on the distinction between crimes and delicts. On the contrary, it supported the general approach adopted by the Special Rapporteur and the Commission. The compromise approach and the inclusion of serious breaches of essential obligations to the international community in a separate chapter of the draft articles would permit a balance to be found. However, the problem of how to define serious breaches still remained. A definition had been included in the draft articles that had been provisionally adopted in 1980 and Slovenia was of the view that the Commission should carefully consider the question.

24. The articles on the forms of reparation had been more or less reformulated with a view to strengthening the obligation of the responsible State. The delegation of Slovenia approved of that decision but believed that caution must be exercised, since in certain cases moderation was necessary. In that regard, it was preferable either to retain subparagraph (d) as it stood in the 1996 draft articles which envisaged situations in

which restitution would seriously impair the economic stability of the responsible State, or to at least make it clear that the subparagraph removed was covered by the new subparagraph (b).

25. Article 39 provided for interest, whatever the form of reparation. Satisfaction, however, was essentially an expression of regrets and an acknowledgement of a breach that was solely concerned with damages which were not economically quantifiable, and it was therefore logical that it should be excluded from the provision.

26. The delegation of Slovenia supported the approach adopted by the Commission, which was not to give too broad a definition of the injured State and to draw a distinction between States that were individually injured and those which, while not directly injured, nevertheless had a legal interest in the performance of the obligation. The articles concerned with the invocation of responsibility, which were based on the provisions of the Vienna Convention on the Law of Treaties, set out the procedure and established clear rules in the matter. The work of the Commission in the field of diplomatic protection would permit the elaboration of rules that could be applied to questions of the nationality of claims and exhaustion of domestic remedies. The delegation of Slovenia was of the view that article 49 (2) (b), which provided that a State not directly injured was entitled to claim reparation in the interest of the injured State or of the beneficiaries of the obligation breached, was questionable and proposed that the words "of the injured State or" should be deleted from the paragraph.

27. On the subject of countermeasures, Slovenia was of the view that, while the question should be included in the codification of the rules on State responsibility, it was different from State responsibility and merited separate treatment. The Commission had carefully considered the question, including the right of any State, under certain conditions, to take countermeasures in cases of serious breaches of obligations. In certain circumstances, such as in the case of serious and systematic human rights violations, the proposed rules could certainly be justified but, because of its broad scope, risked at the same time giving rise to abuses.

28. **Mr. Jacovides** (Cyprus) recalled that he had stated 10 years earlier that, while State responsibility had concentrated primarily on responsibility for injury to aliens, with the development of *jus cogens* and its acceptance in the Vienna Convention on the Law of Treaties and the existence of hierarchically higher rules as set out in the United Nations Charter, the topic of State responsibility had been placed on a much broader foundation and it was now recognized, including by the International Court of Justice, that obligations *erga omnes* existed and that the interest of the international community as a whole and of international public order needed to be taken into account. The Commission must ensure that the expectations of the international community, and in particular of the new States that had come into existence after the classical rules of international law on that topic had been formulated were not disappointed.

29. In the view of the delegation of Cyprus, that position was still valid. While it was understandable that the pendulum might swing backwards towards the middle ground from extreme and controversial positions in the light of the constant evolution of international law, care should be taken not to allow it to swing back too far to the traditional conventional approach at the expense of progressive notions imported into the law largely as a result of the impact of newly independent States.

30. Turning to the current text, several issues remained outstanding. On the question of what form the draft articles should take, the delegation of Cyprus, together with other States, notably the Nordic States, would prefer that they be adopted as a legally binding convention, alongside such major codification projects as the Vienna Convention on the Law of Treaties, the United Nations Convention on the Law of the Sea and, more recently, the Rome Statute of the International Criminal Court. The subject was too important to have it treated in a lesser fashion, such as a model law or a declaration. However, Cyprus was not precluding any other alternatives, provided that its basic concerns were satisfied. Cyprus had consistently advocated the position that all multilateral law-making treaties concluded under the auspices of the United Nations should include an effective, comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding disputes arising out of the substantive provisions of the convention in question. That position was dictated both by reason of the attachment of Cyprus to the general principle of equal justice under the law and by reason of its national self-interest as a small State which needed the

protection of the law, impartially and objectively administered, in order to safeguard its legitimate rights.

31. Like Hungary, Cyprus also attached special importance to the establishment of an effective dispute settlement mechanism, which was the condition sine qua non of a well-functioning legal regime of State responsibility. The usefulness of the elaboration of comprehensive rules concerning such a mechanism did not depend on the eventual decision on the final form of the text.

32. On countermeasures, the position of Cyprus was that, if they were to be retained at all, their scope should be restricted and narrowly defined, since they lent themselves to abuse at the expense of the weaker States. They should be aimed at restitution and reparation rather than punishment and should be applied objectively and not abusively. They should be subject to binding dispute settlement procedures (preferably in a separate article, immediately following article 50, as had been suggested by the Nordic States). It should also be stressed that armed countermeasures were prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which had become a customary rule of international law. Moreover, other rules of *jus cogens* involving basic human rights rules were not subject to derogation in the case of countermeasures.

33. Indeed, in the context of State responsibility, as in other areas of international law, the concept of *jus cogens* or peremptory norms of international law needed to be clarified, not eroded or ignored. The issue of consent, which must in any case be freely given, should be approached with caution, since the very essence of the notion of *jus cogens* was that it could not be derogated from by agreement between the parties, because that would be incompatible with international public order. Thus, in connection with article 20 of the draft, entitled "Circumstances precluding wrongfulness", Cyprus fully shared the regret which had been expressed by the delegation of Israel that the exception regarding the ineffectiveness of consent in cases of peremptory obligations had not been retained.

34. Concerning serious breaches of essential obligations to the international community, Chapter III represented a compromise in order to overcome the article 19 controversy on the question of international crimes, as distinct from delicts. Such a compromise appeared acceptable, particularly in the light of the development of the notion of individual criminal responsibility, as in the Rome Statute of the International Criminal Court.

35. Cyprus saw the reason for a distinction between States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations but which did not suffer economically quantifiable injury. While the legal interest existed for both categories of States, in the practice of States it was the specifically injured State that had the right to reparations.

36. Lastly, his delegation also believed that, whenever restitution was materially impossible, the wrongdoing State Must compensate the specifically injured State, and that compensation should include, in addition to the principal sum, interest and loss of profit. The new article 39 on interest should therefore be retained.

37. **Mr. Anwar** (Indonesia) said that the report of the Special Rapporteur on State responsibility and the comments adopted by the International Law Commission, taking into account the observations of States, provided a good foundation upon which to proceed further on the topic. The result of that work, namely, the draft articles, must be based on generally recognized principles of international law.

38. As for countermeasures, while reserving the right to comment in further detail at a later date, he noted that the rules governing their application were not yet sufficiently clear in the relevant existing law and that, accordingly, only a brief and general reference should be made to them. In any event, any dispute between an injured State and a responsible State should be settled peacefully and not by unilateral recourse to countermeasures.

39. With regard to diplomatic protection, the proposed approach, in which existing international law in that area would be developed with a view to establishing direct recognition of the rights of an individual in the context of human rights protection, or recognition of the use of force as a means by which States could exercise diplomatic protection, complicated the work of the International Law Commission rather than simplifying it. The Commission should confine itself to the strictly technical aspects of the concept of diplomatic protection which were already governed by treaties and

the laws in force. Recourse to the use of force did not fall within the scope of the question under consideration but rather was a topic which should be addressed as a whole in the context of the application of the Charter of the United Nations. Moreover, the concept of a state of necessity, and the duty of humanitarian intervention which the Special Rapporteur mentioned in that connection, were not consistent with the generally accepted principles of international law and should not be included in the consideration of the question of diplomatic protection.

40. With regard to reservations to treaties, an area of international law already codified in the 1969 Vienna Convention, his delegation supported the approach taken by the International Law Commission in preparing a guide for States rather than a new legal instrument. It was pleased at the progress achieved by the International Law Commission, which had just adopted draft guidelines on first reading.

41. In view of the complexity of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the progress achieved by the Special Rapporteur in the elaboration of revised draft articles which were ready for adoption and took into account comments by States and members of the International Law Commission.

42. Lastly, the seminars organized by the International Law Commission, which were of great benefit to students, lawyers and government officials from developing countries wishing to familiarize themselves with the work of the Commission and expand their knowledge of international law, were greatly appreciated. He also thanked Member States who helped finance the fellowships granted to participants from the less wealthy countries out of a concern to ensure equitable geographical representation.

43. **Mr. Czapliński** (Poland) expressed his delegation's satisfaction that the work of the International Law Commission on the question of State responsibility was nearly complete and hoped that it would culminate with the adoption of an international convention under United Nations auspices, although other forms of the text would be acceptable. His delegation accepted the general structure of the draft, as decided by the International Law Commission, and wished to propose amendments to specific articles only.

44. It was his delegation's understanding that draft article 13 was of an intertemporal nature and was aimed at excluding any retroactivity in the application of the provisions. Otherwise, it would duplicate article 12. Article 31 should be amended, if necessary, by a reference to the provisions of the draft dealing with claims brought by directly or indirectly injured States in order to avoid claims for compensation for moral damage, for which reparation was to take the form of satisfaction only. It was linked to article 40, which stated that, in the determination of reparation, account should be taken of the contribution to the damage, which raised the question as to whether there must be damage in order for an internationally wrongful act to be recognized.

45. Article 32, dealing with the irrelevance of internal law, was of great importance not only for the determination of responsibility but also with respect to other aspects of the law on State responsibility, including the origin of such responsibility. His delegation construed the provision as meaning that domestic law could not be relied upon in order to avoid an international obligation and suggested that that provision should be included in Part Four, together with article 33, which covered the same question as article 56 and allowed for reference to other rules of international law applicable to a specific situation. In that connection, reference could be made to article 60 of the Vienna Convention on the Law of Treaties or to other multilateral international conventions providing for self-contained regimes.

46. His delegation accepted the inclusion of the provisions on serious breaches of essential obligations to the international community, contained in paragraph 1 of article 41, which combined the institutions of *jus cogens* and obligations *erga omnes*; however, that provision was not correctly reflected in Part Two bis of the draft articles. Indeed, it was unclear whether reparation claims in cases of obligations *erga omnes* could be brought by every State or whether they must be brought by the international community as a whole. His delegation agreed with the International Law Commission that it would be difficult to achieve a general consensus on that point but it would nonetheless appreciate clarification.

47. As for restitution, his delegation suggested that article 36 should speak of re-establishing the situation which would have existed if the wrongful act had not been committed, which did not necessarily imply that full restitution should be made. Indeed, full restitution might be excluded if it seemed that it would impose an excessive burden on the responsible State. He therefore proposed that the scope of the provisions of article 36 (b) should be extended to cover reparation within the meaning of article 37.

48. His delegation welcomed the inclusion in the draft articles of provisions on countermeasures, to which it proposed two amendments. In paragraph 5 of article 53, the word "and", which connected paragraphs (a) and (b), should be replaced by "or", since the two conditions need not be fulfilled jointly. The wording of paragraph 4 would have to be amended accordingly. His delegation also had serious doubts about the formulation used in article 54, paragraph 2. Indeed, according to article 59, the obligations arising out of the draft articles were without prejudice to the Charter of the United Nations, which gave the Security Council a monopoly on deciding countermeasures. Nonetheless, the Security Council was sometimes unable to agree on action to be taken in the event of a threat to or violation of international peace and security, or when one of its permanent members used the veto to prevent the adoption of certain measures. Moreover, certain serious breaches of international law (draft article 41) were not within the competence of the Security Council. Paragraph 2 of article 54 would thus authorize each State to have recourse to countermeasures in consultation with the other States involved. Although there was a trend in that direction, it hardly reflected the general practice of States. The question should therefore be clarified by the International Law Commission before the draft was adopted in its final version. Lastly, he said that the countermeasures adopted by third (indirectly injured) States should be aimed primarily at the cessation of the internationally wrongful act rather than at obtaining reparation for the directly injured State.

49. In conclusion, while his delegation was prepared to accept the inclusion of the provisions on the right of individuals to invoke the provisions of international law on State responsibility, it was not fully convinced that such an approach did not go beyond the practice of States. Indeed, paragraph 2 of article 34 was unclear as to the relationship between the law on State responsibility and claims for reparation based on private law brought before the national courts of the responsible State. On the other hand, it welcomed the inclusion of article 58 on possible individual criminal responsibility and hoped that its implementation would soon be possible within the context of the work of the International Criminal Court.

50. **Mr. Rogachev** (Russian Federation) highlighted the positive aspects of the report of the Special Rapporteur, which was more concise than the previous version and reflected much more modern norms. It would take time, however, to determine the specific impact on international relations of a number of provisions, such as those dealing with countermeasures, particularly collective countermeasures; serious breaches of obligations to the international community as a whole; and the definition of an injured State.

51. A separate chapter had rightly been devoted to countermeasures, since a wrongful act did not necessarily give rise to the right to resort to countermeasures, which could only be invoked if the State responsible for the wrongful act refused to fulfil the obligations arising from its responsibility. The most complex issue in that regard was the taking of countermeasures by States other than the injured State. It would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big Powers the opportunity to play the role of international policemen. The only exception concerned the acts referred to in article 41. There were cases where such relations between States might also fall under the jurisdiction of international organizations responsible for security matters. His delegation intended to submit written comments on that sensitive subject to the Commission.

52. Part Two, Chapter III of the draft, "Serious breaches of essential obligations to the international community", was especially important in view of the extension of the effects of the draft articles to the obligations that States owed to the international community as a whole (article 34, paragraph 1). Increasing globalization was leading to greater interdependence and interaction between States. However, the concept of international community was too broad; it was not a legal concept. Therefore, rather than talking about "serious breaches of essential obligations to the international community", it would be preferable to refer to "serious international

violations". Due to their seriousness, an absolutely clear definition was needed of those violations. Unfortunately, the draft did not have an article containing such a definition; the definition given in passing in article 41, "Application of this chapter", was too general and opened the door to potential abuse. It would be useful to include elements of the definition of crimes given in draft article 19 adopted on first reading. The obvious defects of the definition in draft article 41 were the reference to the systematic nature of the breach and the unnecessary reference to the risk of causing substantial harm to the fundamental interests protected by the obligation in question. Chapter III concerned international responsibility arising from an internationally wrongful act and should therefore be entitled "Responsibility arising from serious breaches ..." and not "Serious breaches ...". Consequently, the title of article 42 should also be amended to read: "Responsibility arising from serious breaches of international obligations". As far as the contents of that article were concerned, it should be noted that in view of the undeniable responsibility of States (obligation not to render assistance to the responsible State in maintaining the situation so created, to cooperate as far as possible to bring the breach to an end), such obligations were also applicable to situations resulting from other types of violations. Moreover, concerning the obligation to cooperate, the qualifying phrase "as far as possible" should be deleted. Lastly, the obligation to cooperate should also be extended to measures guaranteeing the implementation of the responsibility of the State responsible for the internationally wrongful act.

53. The provisions of Chapter V of Part One, "circumstances precluding wrongfulness", were related to the general principles of law, since they were well represented in national law. But article 27, "Consequences of invoking a circumstance precluding wrongfulness", was problematic because it stated that the invocation of a circumstance precluding wrongfulness was "without prejudice to the question of compensation for any material harm or loss caused by the act in question", although it should not be applicable to certain circumstances precluding wrongfulness such as consent, compliance with peremptory norms, self-defence, countermeasures and *force majeure*. On that point, his delegation endorsed the view expressed by the Special Rapporteur in his second report that the question of compensation arose only in cases of distress and necessity. In fact, in such cases, it would be more accurate to refer not to circumstances precluding wrongfulness, but to exemption from responsibility. Otherwise, it was not clear how the question of compensation could arise.

54. The title selected during the debates for Part Two of the draft articles was correct from the legal viewpoint and faithfully reflected the contents of that Part. However, the title of the first article of Part Two, "Legal consequences of an internationally wrongful act" was at variance with its contents. The article correctly stated that it was international responsibility which entailed consequences, and not the internationally wrongful act. Referring to article 34, which defined the scope of international obligations covered by that Part, he said that there should be a full stop after the words "circumstances of the breach", since the reference in that article to beneficiaries other than a State was questionable and required at the very least more discussions on the issue and the inclusion of the concept in articles 49 and 54.

55. With respect to the forms of compensation (chapter II of Part Two of the draft), article 37, "Compensation", gave too broad an interpretation of compensation, including loss of profits, a controversial concept which, in his view, should be the subject of a separate article. Satisfaction (article 38) could be defined as a special form of compensation in cases where the damage was not material, while the acts listed in article 38, acknowledgement of the breach, expression of regret, formal apology, had to be accomplished irrespective of the form of compensation.

56. In Part Four of the draft, "General provisions", instead of using *lex specialis* in the first article, the concept of "special regimes" should be used, since the article dealt not with norms or acts, but specifically with a body of norms which constituted a regime of responsibility. It was a well known fact that the concept of special regime had broad acceptance in international law in terms of both the texts and practice.

57. The draft articles on responsibility could become an important element of the international legal system and could eventually become a draft convention.

58. **Mr. Al-Melhem** (Kuwait) said that, in accordance with the principles of the Charter of the United Nations, it was absolutely necessary to come up with a definition of the responsibility of States for their internationally wrongful acts. Countermeasures were particularly important to the injured State, since they

enabled it to get the responsible State to assume its obligations with respect to cessation and reparation or to negotiate in order to settle the dispute without affecting the rights of that State, in conformity with the principle of reciprocity. His delegation endorsed the proposals put forward by a number of delegations concerning the establishment of criteria and norms with respect to countermeasures to ensure that the latter were not used to harm the responsible State. Moreover, responsibility in all its forms should be defined on the basis of the United Nations Convention on the Law of Treaties. That issue should be the subject of a treaty or, better still, an instrument of the United Nations on the responsibility of States. Cooperation between the different delegations and the Commission was necessary to achieve a consensus so as to put an end to all the wrongful acts committed by some irresponsible States thus giving effect to the provisions of the Charter of the United Nations concerning the maintenance of international peace and security.

59. **Ms. Álvarez Núñez** (Cuba) said that her country attached importance to and had contributed to the consideration of the issue of State responsibility. The Commission had made laudable efforts to replace the concept of State crime by an acceptable definition which clearly established the international responsibility of States in cases of acts of aggression, threat or use of force in international relations and the unilateral imposition of coercive measures. However, her delegation was concerned by the inclusion in article 41 of the concept of serious breaches of essential obligations to the international community and the reference in article 42 to the consequences of such breaches, which should be considered in the light of the delicate link with article 49 on the invocation of responsibility by States other than the injured State and article 54 itself, paragraph 2 of which provided that any State might take countermeasures. The concept of essential obligations for the protection of basic interests, which justified the intervention of States that were not directly injured, should be further clarified because it was directly related to the concepts of *jus cogens* and obligations *erga omnes* with respect to which international codification efforts had not made much progress. Her delegation preferred the term "international community of States" used in the Vienna Convention on the Law of Treaties to the very vague and disturbing term "international community". Moreover, the recognition in article 54, paragraph 2, of the right of any State to take countermeasures in the interest of the beneficiaries of the obligation breached went well beyond the progressive development of international law. The lack of precision in the provisions proposed in the draft articles might lead to the justification of collective sanctions or collective interventions. Therefore, articles 49 and 54, which gave rise to complications, should be deleted and the meaning of the provisions of article 41 should be elucidated.

60. Countermeasures were one of the most controversial aspects of the question of State responsibility because they often served as a pretext for the adoption of unilateral measures such as armed reprisals and other types of intervention. It was therefore important to define them carefully and to set limits on their use. In that respect, the current version of the draft articles was a significant improvement compared with the previous text. In general, the legitimization of reprisals following an illicit act tended to aggravate disputes between States and was used to justify the wrongful use of force — whether direct or indirect.

61. Furthermore, article 54 itself, in paragraph 1, invoked article 49, paragraph 1, which referred to the protection of a collective interest, meaning that a State other than the injured State could act on behalf of the injured State and adopt countermeasures, which were actually collective. That scenario, which involved more risks than benefits, ran counter to the provisions of article 52 concerning the principle of proportionality. Accordingly, it should not fall within the purview of the draft articles and, if it actually occurred, it should be governed by the existing rules of international law, particularly the provisions of the Charter of the United Nations. The same comment applied to provisional countermeasures.

62. Countermeasures therefore required many clarifications and lengthy consideration: they should be taken only as a last resort and under no circumstances should consist of acts which, by their nature and consequences, involved the direct or indirect use of force or were a tactic motivated by purely political considerations, in violation of the principles of the Charter of the United Nations and international law.

63. With regard to the final form of the draft articles, her delegation believed that much still remained to be done to arrive at a working document that was acceptable to everyone and representative of the

practice of States. In a sphere which was so complex at the technical level and so delicate at the political level, it was not advisable to adopt an innovative and revolutionary approach. Although in the past her Government had been in favour of the adoption of conventions under the auspices of the United Nations, her delegation believed that it was premature, at the current stage of the Commission's work, to decide on the form of the draft articles, an issue which States would be able to resolve only after lengthy reflection, when real progress had been made in formulating the text.

64. **Mr. Biato** (Brazil) said that, like many other delegations, his delegation believed that the revised draft articles formed a balanced and technically sound text. The draft articles on the regime governing countermeasures incorporated many novel aspects that had arisen over the years in international practice. Article 51 was especially welcome in that it set out obligations which were not subject to countermeasures, including the obligation to refrain from the use of force and the obligations for the protection of human rights. With regard to the conditions relating to resort to countermeasures, the draft articles emphasized proportionality and the gravity of the wrongful act in question. They also specified that countermeasures must be suspended if the dispute was submitted to arbitration or judicial settlement, which was consistent with the understanding that countermeasures must remain an instrument of last resort.

65. It was important that countermeasures should not become a punitive instrument that opened the door to the abuse of power. It was for that reason that further consideration needed to be given to the criteria for determining the admissibility of countermeasures and their severity, as well as the question of the rights of third States which were not directly injured, especially the right of the third State to take countermeasures on behalf of the injured State, as well as the notion of breaches of obligations *erga omnes*. Lastly, the question of awarding damages reflecting the gravity of the breach also posed difficulties.

66. The formula adopted to resolve the crucial issue raised by article 19 was ingenious. The notion of a serious breach involving failure to fulfil fundamental obligations, risking substantial harm to the interests of other States, seemed desirable in that it obliged other States to cooperate to bring the breach to an end.

67. His delegation took note of the decision to delete the section on the settlement of disputes on the understanding that that matter would be taken up when the Commission came to decide on the final form of the draft articles. In that respect, however compelling the arguments put forward in favour of a multilateral declaration might be, Brazil felt that such a declaration would be of little value, since it would not be a legally binding document. His delegation believed that the Commission should not confine itself to codifying existing international norms, but must strive to contribute to the progressive development of international law, particularly on a matter as important as State responsibility.

68. **Mr. Thessin** (United States of America) said that the draft articles should reflect customary international law. Yet, despite the significant improvements which had been made to the text, certain provisions continued to deviate from customary international law. There were three areas in which the draft articles could be better aligned with international practice: countermeasures, serious breaches of essential obligations to the international community, and the definition of an "injured State".

69. The provisions relating to countermeasures set forth restrictions that did not reflect customary international law. In particular, under customary international law, there was no duty to negotiate before a State could resort to using countermeasures, as envisaged in article 53, paragraph 2. Moreover, while paragraph 3 would allow provisional and urgent countermeasures to be taken, paragraph 5 required that all countermeasures must be suspended if the dispute was submitted to a court or tribunal. His delegation was concerned that a blanket constraint of that type could be exploited by the responsible State to the detriment of the injured State. At a minimum, it should be clarified that the provisional and urgent countermeasures envisaged in article 53, paragraph 3, were not covered by paragraph 5 of that article.

70. His delegation recognized that there were significant differences of opinion in the international community on the subject of countermeasures. It noted that countermeasures were the only circumstance precluding wrongfulness that was the subject of detailed treatment in the draft articles. Since the Commission intended to complete its work on State responsibility at its next session, it would have only a limited amount of time to devote to the revisions of the

current text which a number of States, including the United States of America, believed were necessary. Accordingly, his delegation proposed that the Commission should consider at its next session a range of issues with respect to countermeasures, including whether the provisions relating to countermeasures in the draft articles on State responsibility could be deleted, or, if that was not possible, how the current text could best be revised to better reflect customary law.

71. His delegation was pleased that the concept of international crimes had been removed from the draft articles. However, the definition of a "serious breach" of essential obligations to the international community, in article 41, paragraph 2, was too vague and over-inclusive. There was nothing to be gained from distinguishing between serious breaches and other breaches, and that distinction did not exist in customary international law.

72. The wording of article 42 (Consequences of serious breaches of obligations to the international community as a whole) was also unsatisfactory. In particular, some might interpret the obligation to pay damages reflecting the gravity of the breach, set forth in paragraph 1, as allowing punitive damages for serious breaches, which was contrary to customary international law. Similarly, his delegation was not convinced that the obligations envisaged in article 42, paragraph 3, had a firm basis in customary international law. Noting that the representative of the United Kingdom had proposed adding some form of saving clause to the effect that the draft articles were without prejudice to any regime that might be established to deal with serious violations of obligations *erga omnes*, his delegation invited the Commission to give careful consideration to that proposal which would make it possible to preserve the structure and objective of the draft articles as a whole.

73. With regard to the definition of an "injured State", his delegation was pleased that the Commission had drawn a distinction between States that were directly injured and those which did not directly sustain injury. That distinction was a sound one, but the Commission could try to narrow the definition of an injured State even further. In that respect, it should be noted that article 43 (b) (ii) provided that if an obligation breached was "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned", the State concerned could claim injured status. That language was too broad, and could defeat the purpose of drawing a distinction between injured States and other States.

74. Regarding the form which the draft articles on State responsibility should take, in the view of the United States it would be neither useful nor productive to adopt them in the form of a convention. Since the text dealt with secondary rules of international law, the treaty form did not seem appropriate. If the Commission decided not to codify the draft articles in the form of a convention, it could continue to leave aside the part dealing with the settlement of disputes, which had been included in the draft adopted on first reading and had been omitted from the version currently under consideration.

75. Concerning diplomatic protection, the United States believed that it was clearly a discretionary right of the State, and categorically rejected the notion that it was a right of the individual. Moreover, the progressive development of international law should be taking place only in areas where there were gaps in customary international law. Diplomatic protection was not one of them.

76. His delegation was not persuaded that it made sense to consider unilateral acts of States for the purposes of codification or progressive development. To prepare draft articles on the topic might restrict the flexibility which States enjoyed in that area. Since unilateral acts were extremely varied, one might ask whether it was possible or sensible to devise general rules to apply to each and every case. It would be better if the Special Rapporteur were to confine himself, at least in the first instance, to a survey of State practice.

77. Concerning reservations to treaties, his delegation thought it would be a good idea for the Commission to compile a guide to practice dealing with reservations and interpretative declarations.

78. Lastly, with regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation thought the topic was of particular importance in the field of international environmental law. It supported the Commission's decision to defer consideration of the question until the draft articles on the prevention of transboundary harm had been adopted on second reading.

79. **Mr. Zellweger** (Observer for Switzerland) welcomed the Commission's decision to exclude the notion of crime from the draft articles. The concept of a serious breach of fundamental obligations towards the international community seemed to be more useful. He would confine himself to commenting on the question of reparation and countermeasures.

80. With regard to reparation, draft article 31 raised the issue of causal responsibility. The existence of a cause-and-effect relationship between a breach of international law and the presence of damage was enough to make the State committing the breach responsible for the damage. Although that type of responsibility held good for many situations, it was possible that a minor violation, through a combination of exceptional circumstances, might lead to considerable damage which the responsible State had been unable to anticipate. He wondered if it might not be advisable to make provision for a limited and mitigated form of responsibility in cases where there was no intention of causing harm or where it was impossible to anticipate the damage at the time when the internationally wrongful act was committed. Noting the distinction drawn in draft article 40 between a contribution to the damage made by wilful, as opposed to negligent, action or omission, he took the view that the same distinction should be drawn with regard to the State responsible for the breach of international law.

81. With regards to countermeasures, he agreed with the Commission's general approach. It would be better to regulate countermeasures, with a view to limiting recourse to them, than not to deal with the issue at all. Without objecting to the inclusion of provisions on countermeasures in the draft articles, he thought they should feature in a separate part. They were currently in part two of the draft articles, which might give the impression that countermeasures derived from State responsibility. That was not the interpretation of his country.

82. Another difficulty lay in the relationship between draft articles 50 to 55 and draft article 23. According to draft article 23, an act of a State which was not in conformity with its international obligations would not be wrongful if and to the extent that the act constituted a countermeasure directed towards another State under the conditions set out in articles 50 to 55. But draft article 23 was part of a list of circumstances precluding wrongfulness. If a provision on countermeasures was included in such a list, a question inevitably arose as to the lawfulness and legitimacy of countermeasures in situations other than self-defence, distress or state of necessity. That was a fundamental question which was not adequately answered in draft articles 50 to 55.

83. **Mr. Yamada** (Chairman of the International Law Commission) introduced the second Part of the report of the Commission (A/55/10). With regard to chapter V (Diplomatic protection), he explained that the starting-point for the Special Rapporteur had been that diplomatic protection remained an important tool for the defence of human rights. Although individuals participated in the international legal system and had rights under it, their remedies remained limited.

84. According to the Special Rapporteur, draft article 1 aimed not so much to define the topic as to describe it. Some members of the Commission felt the Special Rapporteur had perhaps over-emphasized the role of diplomatic protection as a tool for protecting human rights. There had also been discussion as to whether diplomatic protection could only be extended when a wrongful act had already occurred, or whether a Government could also extend such protection to prevent injury to one of its nationals.

85. With regard to the nature of diplomatic protection, two different views had been expressed. The first was that diplomatic protection was a right of the individual. The constitutions of a number of States upheld the right of nationals to diplomatic protection, a trend which was compatible with the development of human rights protection in contemporary international law. According to the second view, shared by many members of the Commission, diplomatic protection was a discretionary right of the State. A State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not the State itself but its national which had suffered the injury. However, there was no obligation on the State to present a claim on behalf of its injured nationals. The constitutional obligation to extend diplomatic protection to nationals had no bearing on international law with regard to the subject.

86. Draft article 2 raised two highly controversial questions: first, the question whether international law permitted the use of force to protect nationals and second, whether that matter fell within the sphere of diplomatic protection. Two divergent views had been expressed. According to the first view, draft article 2 was objectionable because it did not include a

categorical rejection of the threat or use of force in the exercise of diplomatic protection. Although there were circumstances exempting a State from responsibility, such as imminent danger or a state of necessity, in the context of diplomatic protection any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable. According to another view, the question of the use of force was not part of the topic and lay outside the Commission's mandate. Diplomatic protection was related to the law of responsibility and was essentially concerned with the admissibility of claims. The mechanisms by which protection could be given to individuals covered a wide range of actions, including peacekeeping, consular activities and so forth. Moreover, the question of the use of force by a State to protect its nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations. The debate in the Commission had made it clear that draft article 2 was unacceptable and should therefore be deleted.

87. Draft article 3 raised the question of whose right was asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. It attempted to codify the principle of diplomatic protection in its traditional form, recognizing it as a right of the State which the State could exercise at its discretion, subject to draft article 4, whenever one of its nationals was injured by another State. Thus the exercise of that right was not limited to instances of large-scale and systematic human rights violations. Moreover, the State of nationality was not obliged to refrain from exercising that right when there was a remedy open to the individual concerned under a treaty relating to human rights or foreign investment. In principle, according to draft article 3, a State was not bound to refrain from exercising diplomatic protection, because its own right was violated when its national was injured. Draft article 3, which followed the traditional view derived from the judgement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, had been found acceptable in principle. However, some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the consequence of a breach of international law.

88. Article 4 dealt with another controversial issue and, as admitted by the Special Rapporteur himself, was a proposal *de lege ferenda*. According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its nationals. It was under no obligation to do so. Consequently, a national injured abroad had no right to diplomatic protection under international law. The Special Rapporteur, relying on recent constitutional provisions providing a right to diplomatic protection for nationals, had been of the view that perhaps that practice should be extended to international law as well. The Commission as a whole had not been able to support that proposition, of which they had found no evidence in State practice. The article had therefore been deleted.

89. Article 5 dealt with the requirement of nationality for diplomatic protection. The views in the Commission had differed. Some members had felt that it placed too much emphasis on nationality as a requirement for diplomatic protection and did not take account of the fact of modern-day life that nationals frequently established residence abroad and thus established a more substantial link with their State of residence than with their State of nationality. Other members of the Commission favoured the traditional view supported by the *Nottebohm* decision.

90. In addition, some members of the Commission had expressed the view that it would be difficult to discuss article 5 in the absence of reference to the questions of denial of justice and the exhaustion of local remedies. For an injury to be attributable to a State, there had to be denial of justice, meaning that there had to be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted, and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started. It had also been generally agreed that article 5 should not deal with methods of acquisition of nationality. What was involved was the right of a State to protect a national, and not the circumstances in which a State could grant nationality.

91. Article 6 dealt with the question of dual or multiple nationality and the requirement of dominant or effective nationality. Members of the Commission had recognized that the development of the principle of dominant or effective nationality had been

accompanied by a significant change in the approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions applying the principle of dominant or effective nationality in cases of dual nationality. Some members of the Commission, however, had considered that when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Some other members of the Commission, supporting article 6, had reiterated that the article reflected current thinking in international law and had rejected the argument that dual nationals should be subjected to disadvantages in respect of diplomatic protection because of the advantages they might otherwise gain from their status as dual nationals.

92. Article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual. There had been general support in the Commission for that article. There had also been substantial support for paragraph 2 of the article, which provided for joint exercise of diplomatic protection by multiple States of nationality. It had, however, been noted that the article or the commentary to it should anticipate some practical problems that might occur in such situations. For example, what would happen if one State of nationality waived its right to exercise diplomatic protection or declared itself satisfied by the response of the responding State, while the other State of nationality continued with its claim?

93. Article 8, as proposed by the Special Rapporteur, had been the last article discussed by the Commission at its most recent session. The article dealt with diplomatic protection of stateless persons or refugees by the State of residence, and, in the view of the Special Rapporteur, was *de lege ferenda*. The views in the Commission had differed. Some members had found that such a progressive development of international law was warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. Others, however, considered that in the case of protection of refugees, the better could become the enemy of the good. If States believed that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. Refugee status in the classical sense of the term was an extremely important weapon for the protection of individuals against persecution or the well-founded fear of persecution. If the Commission made the burden too heavy, the serious difficulties that already existed in maintaining the classical system would be exacerbated. However, if diplomatic protection was conceived as being at the discretion of the State and not as the right of the individual, then the article, with some modification relating to the conditions under which such protection might be exercised, would be more acceptable to those members.

94. The Commission had established Informal Consultations to consider some of the issues raised in articles 1, 3 and 6 in more detail. Having considered the report of those consultations, it had decided to refer articles 1, 3 and 5 to 8 to the Drafting Committee, together with that report. The Commission would welcome any views that representatives might have on the articles proposed, in particular on the issues and questions mentioned in paragraph 24 of the Commission's report with regard to that topic.

95. Turning to chapter VI of the Commission's report, on unilateral acts of States, he recalled that the Commission had before it the third report of the Special Rapporteur and the report of the Secretary-General containing the replies of Governments to the questionnaire sent to them in the previous year. Paragraphs 510 to 528 of the Commission's report contained a summary of the presentation which the Special Rapporteur had made of his third report, and paragraphs 529 to 619 the summary of the debate on that report, as well as the concluding remarks by the Special Rapporteur. The texts of the draft articles proposed by the Special Rapporteur were contained in footnotes 117 to 121 of the report.

96. The general comments contained in the summary referred *in extenso* to the question of the relevance of the topic as well as to the question of its appropriateness for codification. In that connection, he drew attention to paragraphs 533 and 534 of the report.

Some members of the Commission had noted that the great diversity of unilateral acts present in the practice of States was a factor which rendered difficult a general exercise of codification in their regard and had suggested that a step by step approach dealing separately with each category of act might be more appropriate. In the view of other members of the Commission, it would be appropriate to divide the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way. Members of the Commission had also stressed the importance of a good survey of State practice in any attempt to codify the topic and had encouraged the Special Rapporteur to reflect such practice extensively in his reports. Other general comments had referred to the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties and had supported the concept of flexible parallelism developed by the Special Rapporteur in his report. Various views had also been expressed on the question whether the concept of estoppel should be taken up within the context of unilateral acts of States. For some members, estoppel could be omitted for the time being from the general study of unilateral acts, and taken up later to determine its possible impact in particular contexts. Some other members had adopted a somewhat more active approach to that question, as reflected in the summary.

97. The comments on draft article 1 had revolved around the main elements of the proposed definition of a unilateral act. It had been observed that the main differences between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts be "autonomous", the replacement of the expression "the intention of acquiring international legal obligations" by the expression "the intention of producing legal effects" and the replacement of the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned. Specific comments had also been made on the following elements of the proposed definition: "the expression of will with the intention to produce legal effects"; the phrase "in relation to one or more other States or international organizations" which in the proposed definition qualified the words "legal effects"; the word "unequivocal" which qualified the words "expression of will" as well as the words "and which is known to that State or international organization" which in the proposed definition related to the expression of will.

98. Mixed reactions had been expressed regarding the notion of "autonomy", which the Special Rapporteur, following the recommendation of the 1999 Working Group, had deleted from the proposed definition. It had been noted in that connection that a unilateral act could not produce effects unless some form of authorization to do so existed under general international law. That authorization could be specific, for example, where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline, or it could be more general, for example, where States were authorized unilaterally to enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness. In another view, the term "autonomy" was perhaps not entirely satisfactory, but the idea of non-dependence as a characteristic of unilateral acts might deserve to be discussed and might help in determining the scope of the draft articles. Also in that connection, some members had been in favour of reintroducing an article on the "scope" of the draft articles, which had been deleted by the Special Rapporteur.

99. Draft article 2, on the capacity of States to formulate unilateral acts, had generally been supported, although some drafting suggestions had been made. With regard to draft article 3, dealing with persons authorized to formulate unilateral acts on behalf of the State, support had been expressed in general for both its paragraphs, although a number of substantive and drafting amendments, reflected in the summary, had been proposed, including a proposal to the effect that the draft article should be supplemented by adding as a third paragraph the existing text of draft article 4. The latter, on subsequent confirmation of an act formulated by a person not authorized for that purpose, had received general approval, although some members had expressed reservations regarding the word "expressly" relating to the confirmation. They had wondered why a unilateral act could not be confirmed tacitly, since the confirmation of a unilateral act should be governed by the same rules as its formulation.

100. Support had been expressed in the Commission for the deletion of former draft article 6 on the

expression of consent. On the question of silence and unilateral acts, which the Special Rapporteur had dealt with in his third report in connection with the deletion of previous draft article 6, differing views had been expressed. In the view of some members, silence could not be regarded as a unilateral act in the strict sense since it lacked intention, which was one of the important elements of the definition of a unilateral act. Consequently, the question of silence and unilateral acts did not belong in the draft articles. Other members were of a different view. They had emphasized that while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence", expressive of acquiescence and therefore constituting such an act. The *Temple of Preah Vihear* case provided an example.

101. Concerning draft article 5, dealing with invalidity of unilateral acts, some members had emphasized its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. They considered that a study on the conditions determining the validity of unilateral acts would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the expression of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity.

102. The connection with a possible provision on revocation of unilateral acts had also been emphasized. The point had been made that if a unilateral act could be revoked it was in the interest of the State to use that method rather than to invoke a cause of invalidity. The causes of invalidity should essentially concern unilateral acts that were not revocable, or in other words those linking the State formulating the act to another entity. It had also been suggested that a distinction should be drawn between cases where an act could be invalidated only if a ground of invalidity was invoked by a State (relative invalidity) and cases where the invalidity was a sanction imposed by law or stemmed directly from international law (absolute or *ex lege* invalidity). Specific comments, reflected in the summary, had also been made in connection with each of the eight grounds for invalidity proposed by the Special Rapporteur in his draft article.

103. As a result of the debate, the Commission had decided to reconvene the Working Group on unilateral acts of States, and had also decided to refer draft articles 1 to 4 to the Drafting Committee and draft article 5 to the Working Group for further consideration. The Working Group had held two preliminary meetings during the first part of the Commission's session. However, because it had to move on to consider other topics, the Working Group had not had time to hold further meetings and, in particular, had not been able to consider draft article 5, on invalidity of unilateral acts, which had been referred to it. The Working Group had indicated that even if, due to the aforementioned circumstances, it had not been possible to draw final conclusions from the debates held during the two meetings, there had been a strong measure of support for the points concerning further work on the topic which were listed in paragraph 621 of the report. The Commission had not had time to consider the report of the Working Group, but had agreed that it would be useful to seek the views of Governments on the points reflected in subparagraphs (a), (b) and (c) of paragraph 621 of the report, and that the Secretariat should proceed along the lines suggested in subparagraph (d).

104. *Mr. Politi (Italy) took the Chair.*

105. **Mr. Abraham** (France) observed that the exercise of diplomatic protection, subject to certain conditions established in 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, sometimes raised difficulties and that consideration of the matter by the Commission therefore seemed particularly opportune.

106. The Special Rapporteur had called article 1 "Scope", which was somewhat vague. Paragraph 1 referred to the first of the two preconditions for the exercise of diplomatic protection: that relating to the existence of an injury caused to a national by reason of an internationally wrongful act attributable to a State. That paragraph, in addition to raising certain drafting difficulties, was inappropriate because it was incomplete. If it was retained, it should recall the two conditions for the exercise of diplomatic protection. In point of fact, the second condition, namely the exhaustion of domestic remedies, was just as important as the first. Why refer to the first condition and not to the second, even as a matter of principle? The two conditions should be recalled at the outset and then dealt with in greater detail in the rest of the draft

articles by specific provisions. With regard to the second condition, it deserved to be studied in the light of the development of international law and of the possibilities henceforth available to individuals who had sustained an injury. The Commission should therefore concern itself with the question whether recourse to a non-national jurisdiction accessible to all could or could not be considered a "domestic remedy", even if a purely literal interpretation did not allow that question to be answered in the affirmative.

107. The actual drafting of paragraph 1 was problematic. The word "action" seemed ambiguous and disputable. Diplomatic protection was not an action as such. It was the setting in motion of a process by which the claim of natural or legal person was transformed into a legal relationship between two States. That was one of the methods of entailing the responsibility of the State to which the injury was attributable. Furthermore, the question arose as to what was meant by "internationally wrongful omission", a term hitherto unknown in international law. Paragraph 2, which stated as a principle that diplomatic protection could, in certain "exceptional circumstances", be extended to non-nationals, raised serious difficulties. Quite apart from the fact that it was premature to deal with that very controversial question in article 1, what the Special Rapporteur was really proposing — diplomatic protection for refugees and stateless persons — was absolutely unsupported by State practice and was even contrary to certain international conventions, as would be seen when the time came to consider article 8.

108. Article 2 was not acceptable. It set forth the principle that the threat or use of force was prohibited as a means of diplomatic protection, except in certain cases listed by the Special Rapporteur. Those provisions helped to explain why the Special Rapporteur had used the word "action" in article 1. However, in so doing, he appeared to be mistaken. Diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had suffered injury in another State. That procedure had absolutely nothing to do with the question of the use of force. His delegation therefore believed that article 2 should be deleted.

109. The consideration of article 3 had given rise to a discussion within the Commission on who possessed the right exercised through diplomatic protection. According to the traditional view, it was the State that asserted its own right by taking up the cause of its national. On the other hand, according to another approach, the State was merely the representative of its national, who was the possessor of an interest that was legally protected at the international level. His delegation believed that the first concept should be retained. The State had discretionary competence in the matter. Contrary to what some members of the Commission had suggested, it would not be appropriate to "confine" that discretionary power. Diplomatic protection was a sovereign prerogative of the State as a subject of international law. Its exercise was therefore a right of the State. Furthermore, in order to exercise that right in any specific case, the State took into account not only the interest of its national who had been injured by a wrongful act of another State, but also a certain number of elements related to the conduct of foreign policy. It should therefore be left to the State to determine when to exercise diplomatic protection. For the foregoing reasons, his delegation had serious reservations about article 4, which stated as a principle that, in certain circumstances and "if the injury results from a grave breach of a *jus cogens* norm", the State had "a legal duty" to exercise diplomatic protection. In his delegation's opinion, the national of a State who suffered an injury abroad could not claim any right to diplomatic protection. The State was not bound by an obligation. An article of that nature, which was a proposal *de lege ferenda*, was not supported by State practice. That article, like others, reflected the overriding influence of what could be called a "human rights logic" and his delegation seriously doubted whether it was appropriate for the Commission to include that type of logic in its study.

110. According to article 5, the State of nationality was the State whose nationality the individual sought to be protected had "acquired by birth, descent or by bona fide naturalization". The actual principle on which that article was based posed some problems. The Commission was not considering the acquisition of nationality, but rather diplomatic protection, which could only be exercised on behalf of a national. What was under consideration was not so much the circumstances in which a State could grant nationality, a matter that depended on internal law, but rather the right of a State to protect one of its nationals. His delegation considered that it would be inappropriate for the Commission to try, in the context of its study, to define the nationality link of natural or legal persons or the conditions for granting nationality. However, it

would be useful for it to try to define the conditions for opposability of nationality vis-à-vis another State in the context of diplomatic protection. The International Court of Justice had already considered that question in 1955, but had done so in a very general manner and there was no consensus concerning that jurisprudence.

111. Article 6 also posed certain problems. It stated the principle that the State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national. The principle set forth in the article was in obvious contradiction with the one embodied in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, according to which "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". His delegation thought it would be preferable for the Commission to restrict itself to the principle established in that article, which, as far as his delegation knew, had never been questioned.

112. Article 8 stated the principle that a State could exercise diplomatic protection in respect of an injured person who was stateless and/or a refugee when that person was ordinarily a legal resident of the claimant State. That article which was, once again, clearly an exercise in the progressive development of international law, was not supported by State practice. It even appeared to be in contradiction with certain provisions of the annex to the 1951 Geneva Convention on the Status of Refugees, which made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, nor did it confer on those authorities the right of protection. As for the 1961 Convention on the Reduction of Statelessness, it made no mention of the issue of protection.

113. In the opinion of his delegation, it would be advisable for the Special Rapporteur to examine State practice in that area. In general, the Commission's work on diplomatic protection should be limited to codifying State practice and therefore to customary law. Furthermore, his delegation regretted that the informal consultation group set up by the Commission had decided that the draft articles would not deal with functional protection. It would have been rather useful for the Commission to cover that issue in its study since, by its very principle, it was comparable to the protection exercised by States on behalf of their nationals.

114. Concerning unilateral acts of States, he noted with satisfaction that unilateral acts of international organizations had been excluded from the study; as his delegation had stated the previous year, such a topic merited special consideration by the Commission.

115. As for the draft articles themselves, his delegation welcomed the deletion of former article 1; as it had stated the previous year, the drafting of that article raised many difficulties, as it covered only legal acts, even though political acts likewise could produce legal effects, and disregarded the intention of the author of the act — a particularly fundamental element — simply emphasizing instead the consequences of the act. It seemed impossible to embark on the task of drafting rules of international law applicable to unilateral acts of States if those acts were not well defined in the first place. In that regard, the definition of a unilateral act as contained in the third report of the Special Rapporteur — new article 1 — was preferable to that of the previous year, as it clearly stressed the intention of the State in formulating the act. As shown by the International Court of Justice in the *Nuclear Tests* cases, that intention was as critical to the characterization of the act as to the production of its legal effects. The term "autonomous" no longer appeared in the new definition. Nevertheless, it was essential to understand that, in order to be characterized as such, a unilateral act should generate autonomous legal effects. In other words, it should be independent of any manifestation of will on the part of another subject of international law. Autonomy was an important criterion in determining the strictly unilateral character of the act. However, if the study undertaken by the Commission covered only unilateral acts which were unrelated to pre-existing customary or conventional rules, the topic might lose much of its relevance. Although his delegation had stated during the consideration of the first report that it concurred with the Commission's approach of excluding unilateral acts which clearly fell under treaty law, it did not believe that unilateral acts which could enhance implementation of existing rules should be excluded.

116. The reference in the current wording to knowledge of the unilateral act by the addressee, whether a State or international organization, seemed appropriate. Nonetheless, it would be useful to consider, in the light of State practice, the manner in

which the act could be made known to the addressee. Replacement of the phrase "acquiring legal obligations" by "producing legal effects" was also a move in the right direction, as unilateral acts not only created legal obligations, but could also be a means of retaining rights and sometimes even of acquiring them.

117. The two paragraphs which constituted new article 3 concerning persons authorized to formulate unilateral acts on behalf of the State posed no particular problems, subject to an examination of State practice in regard to paragraph 2. He welcomed the deletion of former article 4, paragraph 3, which laid down as a principle that "heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs" could also formulate unilateral acts on behalf of the State. He continued to believe that such persons could not be deemed to be in a position to bind unilaterally the State which they represented at the international level, unless they had been specifically authorized for that purpose. There again it would be necessary to examine State practice. In that regard, wording derived directly from article 7, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as some had suggested, did not appear to offer the most appropriate solution in the case in question.

118. Article 4 provided that a unilateral act formulated by a person who was not authorized under article 3 to act on behalf of a State was "without legal effect unless expressly confirmed by that State". The principle thus laid down was acceptable. In regard to silence, a question which had been discussed by the Commission during its consideration of article 4, it could not be likened to a unilateral act because it could not be regarded as an unequivocal manifestation of will. Its deletion was therefore to be welcomed. As for article 5, concerning the invalidity of unilateral acts, the approach of taking the rules applicable to treaty acts and applying them as they stood to unilateral acts was somewhat risky. Once again, what counted in dealing with the topic of unilateral acts was State practice. The Working Group should therefore give further consideration to the conditions for the validity and invalidity of unilateral acts.

119. In conclusion, he saw no reason why the draft articles should not be structured around the distinction between general rules applicable to all unilateral acts and specific rules applicable to specific categories of unilateral acts. He also saw no reason why, as part of the study on specific categories of unilateral acts, the Special Rapporteur should not first concentrate on acts which created legal obligations for the author State.

The meeting rose at 6 p.m.